

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN J. WASHINGTON and DEPARTMENT OF VETERANS
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Bonham, TX

Docket No. 03-627; Submitted on the Record;
Issued May 21, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128 on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On May 15, 1982 appellant, then a 29-year-old nursing assistant, filed a claim for a traumatic injury occurring in April 1982 in the performance of duty. The Office accepted appellant's claim for acute lumbar strain. Appellant stopped work on June 7, 1982 and returned to limited-duty employment on December 17, 1989. She stopped work again on May 3, 1992 and did not return.

By decision dated June 15, 2000, the Office terminated appellant's compensation effective June 18, 2000 on the grounds that she neglected suitable work under 5 U.S.C. § 8106(c)(2).

On July 11, 2000 the Office authorized an anterior discectomy and fusion at C5-6 and C6-7. Dr. Charles Gordon, a neurosurgeon and her attending physician, performed the discectomy on August 31, 2000.

On December 22, 2000 appellant requested reconsideration of her claim. By decision dated January 25, 2001, the Office reversed its June 15, 2000 decision and restored appellant's compensation benefits, effective August 31, 2000, the date of her authorized surgery.

In letters dated March 31, April 16 and October 17, 2002, appellant requested reconsideration of the Office's June 15, 2000 decision. Appellant argued that she was entitled to compensation from June 18, 2000 onwards.

By decision dated November 15, 2002, the Office found that appellant's request for reconsideration was untimely and did not establish clear evidence of error.

The Board finds that the Office properly refused to reopen appellant's case for merit review.

The only decision before the Board on this appeal is the Office's November 15, 2002 decision denying appellant's request for a review on the merits of the Office's January 25, 2001 decision reinstating her compensation effective August 31, 2000.¹ Because more than one year has elapsed between the issuance of the Office's January 25, 2001 decision and January 14, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the January 25, 2001 Office decision.²

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that "An application for reconsideration must be sent within one year of the date of the O[ffice] decision for which review is sought." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).³

In its November 15, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision in appellant's claim was issued on January 25, 2001. Appellant initially requested reconsideration by letter dated March 31, 2002, which was more than one year after January 25, 2001.⁴

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes

¹ While appellant specified that she was requesting reconsideration of the Office's June 15, 2000 decision, that decision is no longer in effect as it was reversed by the Office. Appellant's main contention is that the Office, in its January 25, 2001 decision, erred in reinstating her compensation benefits effective August 31, 2000 rather than June 18, 2000.

² See 20 C.F.R. § 501.3(d)(2).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ The record contains a letter requesting reconsideration dated January 18, 2002; however, the letter was received by the Office on November 5, 2002.

“clear evidence of error.”⁵ Office procedures provide that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹¹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹² The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office’s most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant’s claim. In support of her request for reconsideration, appellant resubmitted an August 30, 2000 office visit note from Dr. Gordon, a June 29, 2000 report from an occupational therapist, a functional capacity evaluation dated June 7, 2000 and an August 31, 2000 operative report. As this evidence duplicated evidence already of record, it is insufficient to establish clear evidence of error.¹⁴

⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁶ *Anthony Lucszynski*, 43 ECAB 1129 (1992).

⁷ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *See Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *See Leon D. Faidley, Jr.*, *supra* note 3.

¹³ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff’d on recon.*, 41 ECAB 458 (1990).

¹⁴ *See Dennis G. Nivens*, 46 ECAB 926 (1995).

Appellant further submitted office visit notes from Dr. Gordon dated April 9, 2001 through September 18, 2002. In his office visit notes, Dr. Gordon listed findings on examination and diagnosed, *inter alia*, possible carpal tunnel syndrome and persistent cervical radicular syndrome. Dr. Gordon did not address the issue of whether appellant was disabled from employment effective June 18, 2000 and thus his reports are not relevant to the pertinent issue in this case and do not constitute grounds for reopening appellant's case for a merit review.

Appellant also submitted medical reports dated February 22 and July 24, 2002 from Dr. Aaron Calodney, a Board-certified anesthesiologist, who diagnosed status post anterior cervical fusion at C5-6 and C6-7 with continued symptoms and muscle tenderness. As Dr. Calodney did not address the relevant issue of whether appellant was disabled from work on June 18, 2000, his reports are insufficient to raise a substantial question as to the correctness of the prior Office merit decision.¹⁵

In her request for reconsideration, appellant contended that the Office erred in finding that she did not accept the position offered her by the employing establishment. Appellant related that she attempted the position but was unable to perform the duties. However, the Office was aware that appellant returned to work for a few days in the offered position. The Office did not find that appellant refused suitable work but rather that she neglected to perform suitable work. Thus, appellant has not raised a legal argument not previously considered by the Office.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, properly denied further review of the merits of the case.

¹⁵ The record also contains the results of objective tests from 2001 and 2002. However, as this evidence is not relevant to determining whether appellant was disabled June 18, 2000, it is insufficient to establish clear evidence of error.

The November 15, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 21, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member